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No. 748

IN THE

Supreme Court of the United States

LAVERNE W. SIMPSON. d/b/a
Mid-Seven Transportation Company,
(Now Mid-Seven Transportation Company),
Appellant,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION
Appellees,

MATSON, INC.
Intervenor.

On Appeal From the United States District Court, Southern District of Iowa

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JURISDICTIONAL STATEMENT

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INDEX

	Page
JURISDICTIONAL STATEMENT	1
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	4
STATEMENT OF THE CASE	5
THE QUESTIONS ARE SUBSTANTIAL	9
CONCLUSION	17
APPENDICES:	
A. Decision Below	1a
B. Judgment Below	17a
C. Decision of the Interstate Commerce Commission	19a
C-1 Order of the Interstate Commerce Commission	28a

CITATIONS

Cases:

Andrew G. Nelson v. *United States*, 355 U.S. 554;	2
Carroll Trucking Company—Interpretation of Certificate, 62 M.C.C. 348;	8,17
Cramer v. *Los Angeles City*, 215 P. (2d) 497;	11
Cruise et al v. *City and County of San Francisco*, 225 P. (2d) 988;	12
Commissioner v. *Sunnen*, 333 U.S. 591;	14
Demarious v. *Farrel*, 87 Fed (2d) 957;	12
Donovan v. *City of Santa Monica*, 199 P. (2d) 51;	10,11
Dysart v. *Youngblood*, 109 P. (2d) 664;	10

Page

First National Bank v. *United States*, 2 Fed. Supp. 107; 13
Goldstien v. *United States*, 227 F. (2d) 1; 12
Heintz v. *Adams County*, 75 N.W. (2d) 539; ... 12
Katsoff v. *Tuccrtini*, 103 A. (2d) 502; 10
Memphis-Southwestern (Rate) Investigation, 77 I.C.C. 474; 10
Minneapolis v. *Sand*, 34 N.W. (2d) 689; 11
Ohio Power Co. v. *Deist*, 96 N.W. (2d) 911; 10
Park v. *Casey*, 16 N.E. (2d) 459; 10
Piz v. *Denver*, 289 P. (2d) 905; 11
Ritter v. *United States*, 28 Fed. (2d) 265; 13
Sawyer v. *City of San Diego*, 292 P. (2d) 333; ... 11
Seatrain Lines v. *Penn. R.R. Co.*, 207 Fed. (2d) 525; 14
Sims Motor Transport Lines v. *United States*, 362 U.S. 639; 2
Sioux Falls v. *Cleveland*, 70 N.W. (2d) 62; 10
Smith Bros. Revocation of Certificate, 33 M.C.C. 465; 14
State ex rel v. *City of Helena*, 212 P. (2d) 250; 12
State of Indiana v. *Milk*, 11 Fed. 389; 13
Stewart v. *Welsh*, 178 S.W. (2d) 506; 10
Texas Steel Company v. *Railway Co.*, 70 S.W. (2d) 484; 10
United States v. *Capital Transit Company*, 325 N.W. 357; 2
United States v. *Detroit and Cleveland Navigation Co.*, 326 U.S. 236; 2
United States v. *Denver and R.G. Ry. Co.*, 16 Fed. (2d) 873; 13
United States v. *Rock Island Motor Transit Co.*, 340 U.S. 417; 15

Page

United States v. *Seatrain Lines*, 329 U.S. 424; ... 15

United States v. *Standard Oil Co. of California*, 20 Fed. Supp. 427; 13

United States v. *Carolina Freight Corp.*, 315 U.S. 475; 15

United States v. *Stinson*, 197 U.S. 200; 13

Weinacht v. *Board of Bergen County*, 65 A. (2d) 865; 10

Yick Wo. v. *Hopkins*, 118 U.S. 373; 16

Statutes:

Administrative Procedure Act (5 U.S.C. 1000 et seq.) 17

Interstate Commerce Act (49 U.S.C. 305 et seq.)

305(g) 2, 4

306(a) 3

312(a) 3, 4, 13, 16

Judicial Code—28 U.S.C.

Section 1336 2

Section 2284 2

Section 2321 2

Section 2322 2

Section 2324 2

Section 2325 2

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No.

LAVERNE W. SIMPSON, d/b/a Mid-Seven Transportation Company, (Now Mid-Seven Transportation Company),

Appellant,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellees.

On Appeal From the United States District Court for the Southern District of Iowa

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JURISDICTIONAL STATEMENT

Appellant, Laverne W. Simpson, d/b/a Mid-Seven Transportation Company (now Mid-Seven Transportation Company) appeals from the judgment of the United States District Court for the Southern District of Iowa, entered on December 30, 1961, affirming an order of the Interstate Commerce Commission, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the District Court for the Southern District of Iowa has not been reported. The opinion of the District Court is attached hereto as Appendix "A," and the judgment of the Court is attached as Appendix "B." The decision of the Interstate Commerce Commission is reported in 84 M.C.C. 463. The orders of the Commission are not reported. The Commission's decision and order involved are attached as Appendices C and C-1.

JURISDICTION

This suit was brought pursuant to Sections 1336, 2284, and 2321-2325 of the Judicial Code (28 U.S.C. 1336, 2284, 2321-2325) and Section 205 (g) of the Interstate Commerce Act (49 U.S.C. 305 (g)) to restrain, annul, enjoin and set aside a cease and desist order of the Interstate Commerce Commisison, dated February 21, 1961, and entered in the Commission Docket No. MC-C-1775.

The judgment of the District Court was entered December 30, 1961, and Notice of Appeal filed in the District Court on January 26, 1962.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Sections 1253 and 2101 (b) of the Judicial Code 28 U.S.C. 1253 and 2101 (b). The following decisions sustain the jurisdiction of the Supreme Court to review the opinion and the judgment in this case on direct appeal: *United States* v. *Capital Transit Company*, 325 U.S. 357; *United States* v. *Detroit and Cleveland Navigation Company*, 326 U.S. 236; *Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. 554 (1958); *Sims Motor Transport Lines* v. *United States*, 362 U.S. 637 (1959).

QUESTIONS PRESENTED

1. Where the Interstate Commerce Commission has issued to a motor carrier a final certificate authorizing such carrier to transport "structural steel", and such car-

rier and his (its) predecessors have been transporting, under such certificate, since prior to July 1, 1935, twenty (20) different steel items, for which items the carrier and his predecessors had published tariffs on file with the Commission; also during the time from January 1947, the carrier (the Appellant) who owned and operated under such certificate made substantial expenditures for property and equipment to conduct such operations, does the Interstate Commerce Commission have authority thereafter to arbitrarily determine that the authority possessed by such carrier to transport "structural steel" only entitles him to carry three (3) of the items which he (it) had been transporting throughout the years through the guise that the carrier was carrying unauthorized commodities in violation of Section 206 (a) of the Interstate Commerce Act, 49 U.S.C.A. Sec. 306 (a)?

2. Whether the Interstate Commerce Commission is estopped from claiming or asserting that a carrier is not authorized to carry specified items or commodities under a certificate issued by the Commission after it and its predecessors had been transporting such items under published and filed tariffs with the Commission for more than twenty (20) years and after such carrier has made substantial investments in property and equipment in reliance upon such grant of authority?

3. Does the action of the Interstate Commerce Commission in attempting to restrict and limit the items and articles which a carrier has been transporting, for many years, under a certificate authorizing the transportation of "structural steel", constitute a partial revocation of the certificate in violation of Section 212 (a) of the Interstate Commerce Act, 49 U.S.C.A. 312 (a)?

4. Does the issuance to a motor carrier of a final certificate to transport "structural steel", by the Interstate Commerce Commission, constitute a final determination and adjudication of the carrier's operating rights and

authority in respect to such items of "structural steel" he (it) was carrying at the time of the issuance of such certificate?

5. Does the attempted modification and restriction of a motor carrier's operating rights and authority by the Interstate Commerce Commisison, after such rights have been used and exercised in excess of twenty (20) years by the carrier and his predecessors, together with the expenditure of substantial sums for property and equipment to exercise and carry out such rights, constitute an abuse of administrative power by the Commission and a denial of Due Process and the Equal Protection of Law as guaranteed by the 5th Amendment to the Constitution of the United States?

6. Can the Interstate Commerce Commisison disregard the record evidence in a proceedings instituted by it against a motor carrier in the interpretation of a "commodity description", in a certificate issued to such carrier, by the Commission, and determine the meaning and scope of such "commodity description" solely upon an arbitrary basis and in direct conflict with the record?

7. Is due process denied a moter carrier where the Interstate Commerce Commission, through the Bureau of Inquiry and Compliance of the Commission, institutes an investigation and proceedings to redetermine the carrier's operating rights, many years after the issuance to the carrier of a final certificate, where the Commission is both the complainant and the trier of the fact, and when its decision is predicated upon the Commission's decision in another case, which was in no way similar in fact, rather than upon the record of the case at bar?

STATUTES INVOLVED

This appeal involves Section 205 (g) of the Interstate Commerce Act, 49 U.S.C.A. 305 (g), and Section 212 (a) of the Interstate Commerce Act, 49 U.S.C.A. 312 (a).

STATEMENT OF THE CASE

The decision and order of the Interstate Commerce Commisson, 84 M.C.C. 463, which are the subject of this litigation require the Appellant to cease and desist from the transportation, as a motor carrier in interstate and foreign commerce, of seventeen (17) enumerated iron and steel commodities out of a total of twenty (20) which he (it) and his (its) predecessors had been transporting since prior to July 1, 1935,[1] under published tariffs setting forth such specified commodities on file with the Commission since the inception of such operations. (See Appendix "E" attached to Appellant's Complaint.)

The Appellant in reliance upon the operating authority granted to him by the Commission expanded his operations and made substantial expeditures in property and equipment since he acquired the rights with Commission approval in 1947.[2] The twenty (20) enumerated iron and steel commodities which Appellant has been carrying constitutes ninety-five (95) per cent of his com-

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[1] Mrs. Ethel L. Burton, original owner and operator of the rights involved, testified at the hearing before the Interstate Commerce Commission examiner that she had transported all of such commodities from prior to July 1, 1935, (grandfather date). (See transcript of such hearing pages 145 *et seq.*) The Appellant since acquiring such rights in January, 1947 continued to transport all of such items and commodities up to (and since) the time of the hearing before the aforesaid Examiner. (See transcript of such hearing, pages 209-211.)

[2] Although the Appellant acquired the operating rights involved in 1947 his permanent certificate No. MC-16831 was not issued to him until June 9, 1949. Appellant testified before the Examiner of the Commission that in reliance on the right to transport the twenty (20) enumerated iron and steel commodities which he had acquired with Commission approval he expanded his operations from one (1) small truck to seven (7) large trailers and seven (7) large tractors and purchased a terminal site and erected a garage and office facilities. (See Transcript of Record before the Examiner of the Commission, pages 211-213.)

pany's total volume of business[3] with the result that the elimination of seventeen (17) of such commodities would be ruinous to Appellant.

As a result of the hearing before the Examiner of the Commission he recommended that of the twenty categories of iron and steel which Appellant has been transporting that fourteen (14) of the items did not constitute "structural steel" and he made no finding as to three (3) of the items. (See Appendix "G" of Appellant's Complaint.)

Upon exceptions duly filed to the Examiner's report the Commission, Division One, found that Appellant's certificate authorized the transportation of all but six (6) of the enumerated items of iron and steel. (73 M.C.C. 75, Appendix "I" of Appellant's complaint.) Upon Appellant's petition for reconsideration the entire Commission modified the Report and Decision of Division One and entered the Decision and Order which is the subject of this cause.

Thereafter, the Appellant filed his (its) complaint in the District Court on May 12, 1961 to restrain, annul, enjoin and set aside the cease and desist order of the Commission dated February 21, 1961 entered in Docket No. Mc-C-1775, (84 M.C.C. 463) and on May 12, 1961 the District Court issued a restraining order staying the effective date of the cease and desist order pending the determination of the litigation in the District Court. By stipulation between the parties, dated February 6, 1962, the compliance and effective date of the cease and desist order was postponed pending the final determination of this cause by the Supreme Court of the United States.

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[3] Appellant also testified at such hearing before the Examiner of the Commission that 95% of his company's business was comprised of transporting the 20 enumerated iron and steel commodities as set out in Appendix "E" of Appellant's complaint. (See transcript of Record before the Examiner of the Commission, page 213.)

The Appellant urged before the District Court, as before the omission:

1. That the Decision and Order of the Commission limiting and restricting operating authority to only three (3) of the twenty (20) enumerated iron and steel commodities was arbitrary and without foundation in fact or law;

2. that the Commission was estopped from so limiting and restricting Appellant's operations, because:

a. the Commission had actual knowledge of the operations conducted by the Appellant and his (its) predecessors for more than twenty (20) years;
b. the reliance by the Appellant upon such acquiescence by the Commisison and the investment by him of substantial sums in property and equipment;
c. the resulting irreparable injury and damage which would be sustained by the Appellant;

3. that the Commission had made a final determination and adjudication of Appellant's operating rights and authority when it issued to him, after formal application and hearing, its final certificate of public convenience and necessity, No. MC-16831 on June 9, 1949, and another certificate covering additional territory on March 21, 1950, Docket No. MC-16831 Sub. 4;

4. and urged before the District Court that the action of the Commission in taking away from Appellant the right to exercise the greater part of his operating authority, under the guise of Commission interpretation, after many years of silence and inaction by the Commission, denies to the Appellant Due Process and the Equal Protection as guaranteed to him under the 5th Amendment to the Constitution of the United States, in that:

a. if the Interstate Commerce Act, Part II, granted to the Commission the authority to re-examine, review and redefine Appellant's operating rights at

any remote time that such grant of authority to the Commisison would constitute an unconstitutional delegation of legislative authority;

b. since the Interstate Commerce Act, Part II, provides for no time limitation when operating rights of a carrier can be re-examined and reviewed, a reasonable time for so doing must be implied;

c. the Interstate Commerce Commission was acting as both the complainant and trier of the fact and arbitrarily limited and restricted Appellant's rights contrary to the record and the great preponderance of the evidence.

The District Court gave no consideration to the great preponderance of evidence that each and all of the twenty (20) items were "structural steel" items, as established and accepted in the iron and steel trade and industrial usage, but held that the Commission could base its decision on a prior decision of the Commission, *Carroll Trucking Company, Interpretation of Certificate* (1953) 62 M.C.C. 348, which case was not similar in fact.

The District Court gave no consideration to the contention that the Interstate Commerce Commission's decision and order in this case did in fact constitute a modification and partial revocation of Appellant's certificates after they had become final, in violation of Section 212 (a) of the Interstate Commerce Act, Part II 49 U.S.C.A. Sec. 312 (a), but merely held that the Commission interpreted the meaning thereof and did not diminish the authority possessed by the Appellant.

The District Court failed to consider that the undisputed record established the fact that the Interstate Commerce Commission was estopped to challenge Appellant's operating rights.

The District Court entirely disregarded Appellant's contention that he (it) was denied due process and equal protection of law by reason of the great lapse of time

from the inauguration of Appellant's operations, by Appellant and his predecessors, until the institution of the proceedings to determine Appellant's rights under the certificates issued to him by the Commission, thereby permitting Appellant to assume a position whereby he made substantial capital investment for transporting the items which were challenged and taken from him.

The District Court further entirely disregarded Appellant's contention that he was denied due process and the equal protection of the law because of the fact that the Commission, as both complaintant and trier of the facts, gave no consideration to the great preponderance of the evidence that all of the challenged items were within the category of "structural steel" and it (the Commission) decided the case solely upon an arbitrary basis of a holding by the Commission in a prior case which was in no way similar in fact.

THE QUESTIONS ARE SUBSTANTIAL

The issues involved in this appeal are of vital importance to the Appellant. If the decision and order of the Interstate Commerce Commission are upheld Appellant will be compelled to suspend operation and liquidate the property and equipment, which he has acquired over the years, because the operating authority which he would retain would not be sufficient to warrant his continuance in business.

It was stipulated that Appellant has transported and continues to transport the following items:

> 1) steel tees, zees and angles; 2) steel forgings; 3) steel sheets, strips and plates; 4) steel lathing and grounds; 5) wrought pipe; 6) iron bolts and nuts; 7) steel channels 8) steel washers; 9) steel forms used and re-used for concrete construction; 10) steel tubing; 11) steel rings, rough; 12) steel beams; 13) reinforcing bars; 14) steel stampings; 15) steel bars, round and flat; 16) steel wire; 17) steel rivets; 18)

steel welding rods; 19) steel screws; 20) steel bolts and nuts.

but under the Commission's decision, 84 M.C.C. 463, only 1) steel tees, zees and angles, 2) steel channels, and 3) steel beams were found to be "structural steel".

I.

The Commission in this case arbitrarily disregarded the record evidence and legal authorities in arriving at its determination that only three (3) of the twenty (20) items were "structural steel". All of the witnesses for Appellant testified before the Examiner that all of the twenty (20) items were "structural steel", whereas the sole witness for the Bureau of Inquiry and Compliance testified that all but four (4) of the items, namely items 4, 5, 10 and 13 set out above, were "structural steel".

Structural steel has been defined by many Courts to include virtually any unfabricated item of iron or steel which is used in erecting or completing a structure. *Texas Steel Co.* v. *Mo. K. and T. Ry. Co.*, 70 S.W. (2d) 484; *Weinacht* v. *Board of Bergen County* 65 A. (2d) 865.

Structures have been held to be a trailer-house, *Sioux Falls* v. *Cleveland*, 70 N.W. (2d) 62; a belt conveyor to transport coal, *Ohio Power Co.* v. *Deist*, 96 N.E. (2d) 711; billboards, *Katsoff* v. *Tucertini*, 103 A. (2d) 502; radio poles and wires, *Park* v. *Casey*, 16 N.W. (2d) 459; oil wells and machinery, *Dysart* v. *Youngblood*, 109 P. (2d) 664; a fence, *Stewart* v. *Welsh*, 178 S.W. (2d) 506, etc. Also see *Vol. 40, Words and Phrases, West Publishing Company, 1940 Ed. and Supplement*, page 323 *et seq.*

In the Commission's decision in *Memphis-Southwestern (Rate) Investigation*, 77 I.C.C. 474, it included several hundred items of iron and steel as "structural steel" for rate purposes, which included everything from wag-

on box rods to stove-pipes and from bolts and nuts to man-hole covers.

II.

> ". . . an estoppel may arise against the state (a sovereign) out of a transaction in which it acted in a governmental capacity when an estoppel is necessary to prevent loss to another . . . and if such estoppel will not impair the exercise of the sovereign powers of the state." 19 Am. Jur. 819.

With all of the elements of estoppel (see 19 Am. Jur. 643) present in this case, the most difficult question is: *will equitable estoppel operate against the sovereign, United States Government or its agencies or commissions?*

Admittedly there is much past authority that it does not. The apparent reason for this position is that the public right to efficacious government is a matter of public policy which more than offsets the counter-balance the right of one man standing alone to secure justice before the law.

There is a growing body of law that the ever-expanding governmental numbers be subjected to those same principles of fair dealing applicable to its citizens. The tendency is moving in the direction that governmental agencies must be held responsible for their conduct.

Estoppel may be possible against the government in unusual circumstances, *Donovan* v. *City of Santa Monica*, 199 P. 2d 51; and *Cramer* v. *Los Angeles City*, 215 P. 2d 497; and where justice and right require it. *Sawyer* v. *City of San Diego*, 292 P 2d 333; and in proper cases, *Piz* v. *Denver*, 289 P 2d 905; but such estoppel is generally not applicable to preclude the exercise of government power, *Minneapolis* v. *Sand*, 34 N.W. 2d 689; public officials are not permitted to officially make findings of fact and then impeach such findings by declaring no knowl-

edge of their contents, *State ex rel. Helena Housing Authority* v. *City Council of Helena*, 212 P 2d 250; (but note estoppel fully applicable as between two public agencies, *Heintz* v. *Adams County*, 75 N.W. 2d 539.

In *Demarois* v. *Farrel*, 87 F 2d 957 (1937), it was held that the Government would be estopped in the enforcement of the criminal laws by public policy, such as when its officers lured a Defendant into the commission of a criminal act. If the Appellant in the instant case persisted in his conduct which is now declared to have been illegal, he would become subject to criminal penalties. But the government by its silence induced such conduct in the beginning.

Since the *Demarois Case, supra*, would estop the government in criminal proceedings then, *a fortiori*, the government should be estopped in a mere civil action, such as this.

In the case of *Cruise et al.* v. *City and County of San Francisco*, 225 p 24-988 at 993 (1951), it was said,

> "Whether an estoppel exists against the government should be tested generally by the same rules, as those applicable to private persons. The government should not be permitted to avoid liability by tactics that would never be countenanced between private parties. ***THE GOVERNMENT SHOULD BE AN EXAMPLE TO ITS CITIZENS, AND BY THAT IS MEANT A GOOD EXAMPLE AND NOT A BAD ONE.***"

In *Goldstein* v. *United States*, 227 F. 2d 1, (8th Cir, 1955) the Court states:

> "The doctrine of estoppel is NOT inapplicable to the Government and its officers, but is to be applied with caution. *Vestal* v. *Commissioner of Internal Revenue*, 80 U.S. App. D. C. 264, 152 F. 2d 132, 136; *Barnett Investment Co.* v. *Nee, D.C., W.D. Mo.*, 72 F. Supp. 81."

The rules of estoppel and fair dealing are held applicable to the government in *Dayton Airplane Co.* v. *U. S.*, 21 F. 2d 673, (1927).

The Government is estopped by acts *OR OMISSIONS* of its officers *WITHIN THE SCOPE OF THEIR AUTHORITY*. *Ritter* v. *U. S.*, 28 F. 2d 265 (1928), the Court stating:

> ". . . it is true as the Plaintiff contends that when the sovereign becomes an actor in a Court of justice, its rights must be determined upon those fixed principles of JUSTICE which govern between man and man in a like situation. *Walker* v. *U.S.*, 139 F. 409; Aff'd. 148 F. 1022, 79 C.C.A., 392 (1905); *Cook* v. *U. S.*, 91 U.S. 389, 23 L. Ed. 237; *U. S.* v. *Flint*, 25 Fed. Cas. P 1107, No. 15, 121."

See also *U. S.* v. *Denver and R.G.W.R. Co.*, 16 F. 2d 873 (1927); *U. S.* v. *Stinson*, 197 U.S. 200, 25 S. Ct. 426 (1936); *State of Indiana* v. *Milk*, 11 F. 389 (1882); *CF. U. S.* v. *Standard Oil Co. of Cal.*, 20 F. Supp. 427; *First National Bank* v. *U. S.*, 2 F. Supp. 107 (1933).

Since no element of detriment to the public interest exists *in this case* the doctrine of equitable estoppel should be invoked against the Interstate Commerce Commission and prohibit it from now calling illegal what it has known about and approved for over 20 years.

III.

The action of the Commission in restricting and limiting Appellant's operations to only three (3) of the twenty (20) items of iron and steel which he and his predecessors had been transporting for more than twenty (20) years and for which a final certificate had been issued to Appellant clearly constitute a modification and partial (a very substantial) revocation of his (its) certificate, in violation of Section 212 (a) of the Interstate Commerce Act, Part II, 49 U.S.C.A. 312 (a), and the Commission

should be barred from such action by final adjudication of the carrier's rights.

In the instant proceeding the Commisison by its orders made the statutory finding that Appellant's acquisition of the certificates and operating rights was consistent with the public interest. Pursuant to application to the Commission the Appellant acquired the grandfather rights of his predecessor. The predecessor had been carrying, and the Commisison knew it, all of those articles which the Commission now seeks to prohibit.

It is a matter of sound public policy, and absolute necessity to the very heart of the economy of the United States that rights and obligations be finally settled. If things were to be generally in such a state of relativity and flux, as the Commission feels privileged to maintain, then the Capital-Risk taking structure of the economy would certainly be undermined.

The reasons for invoking *res judicata* are the same in administrative law as in other cases. Whatever the substantive field, *"res judicata"* ". . . rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations," *Commissioner* v. *Sunnen*, 333 U.S. 591, 597 (1948).

In the case of *Seatrain Lines* v. *Pennsylvania R.R.*, 207 F 2d 525 (3rd Cir. 1953) the Interstate Commerce Commission was held to be bound to its own determination of jurisdiction. The Circuit Court held that as to the determination by the Interstate Commerce Commisison *"Res Judicata* should and does apply."

There comes a time when the right to challenge the operations of a carrier, under a certificate of public convenience and necessity, must terminate. In *Smith Bros. Revocation of Certificate*, 33 M.C.C. 465, the Commission itself said:

> "once a certificate, duly and regularly issued, becomes effective, our authority to *terminate* it is expressly marked off and limited. . . . *the certificate marks the end of the proceedings* just as the entry of a final judgment or decree marks the end of Court proceedings."

This principle was expressly upheld in *U. S.* v. *Seatrain Lines*, 329 U.S. 424, 91 L. Ed. 396 (1953); *U. S.* v. *Rock Island Motor Transit Co.*, 340 U.S. 417, 95 L. Ed. 391.

It is the position of the Appellant that where he and his predecessors had filed tariffs specifying the various items and commodities handled by him and his predecessors, without objection for many years, and upon the issuance of his certificate, that this case falls squarely within the case of *U. S.* v. *Carolina Freight Carrier Corp.*, 315 U.S. 475. Appellant was entitled to carry all of the items and commodities, under his authority as a "structural steel" carrier for which he and his predecessors had established grandfather rights and for which they had published and filed tariffs with the Commission.

The curtailment of Appellant's operations to the extent that he could not handle a substantial part of his current traffic would constitute a virtual revocation of his certificate without just cause or legal grounds.

The interpretation which the Commission seeks to place upon the operating rights of Appellant under his authority to transport structural steel, would be tantamount to amending and modifying his certificate after it reached its final form and after it constituted a final determination of his rights.

IV.

The act of the Interstate Commerce Commission in challenging the established rights of the Appellant and any part of the Interstate Commerce Commission Act

which purports to give the authority for such action, after such an unreasonable time, is unconstitutional as stated in *Yick Wo.* v. *Hopkins*, 118 U.S. 373;

> "It lays down no rules by which its impartial execution can be secured or partiality and oppression prevented."

Whether the Commission will act to define what the carrier may transport when he first gets his authority to haul (the appropriate time to apprise him of his privileges and obligations) or whether the Commission will attempt to interrupt, more than 20 years later, now depends, under the present policy of the Commission, upon nothing more than the personal reaction and whim of the Commission.

The Statute (49 U.S.C. 204 (c) and 312 (a)) does not provide any limitation or period in which the obligations and rights of a carrier must be settled if the position of the Commission is sustained in this case.

If the Commission may attack him today or in ten years with equal force the acts of the Commission and the Interstate Commerce Act in this respect are grossly unfair, deny the necessary equal protection of law and are therefore unconstitutional and of no legal effect.

Since the Commission is not bound by any time limitation in which to exert its power, the only way the constitutionality of the Interstate Commerce Act and the Acts of the Commission in this regard can be upheld is to read into the Act the Congressional intent that the Commission be required to act within a reasonable time.

V.

The Interstate Commerce Commission in this case not only disregarded the evidence of witnesses including its one witness at the hearing before the Examiner but also disregarded the finding of the Examiner in reaching its

conclusion that Appellant was only authorized, under his (its) "structural steel" authority, to transport three (3) of the twenty (20) items that he and his predecessors had been carrying for more than twenty years.

In reaching this conclusion the Commission (see Appendix "C") arbitrarily states:

> ". . . we must conclude that the term 'structural steel' as used in respondent's (Appellant's) certificates has a trade and industry meaning which does not embrace the iron and steel items enumerated in our findings."

In arriving at this decision the Commission was acting as both the prosecutor and jury, giving little, if any, consideration to the findings of the Examiner, who was apparently acting under the provisions of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. Sections 1001-1011, and predicated its decision upon its holding in *Carroll Trucking Co. Interpretation of Certificates*, 62 M.C.C. 348, in which case the Commission merely interpreted "structural steel" to include steel channels intended for use in the manufacture of automotive lift trucks.

In deciding this case, the Commission disregarded Appellant's rights and took from the Appellant valuable rights without due process in that the record in the instant case was entirely disregarded and the Commission's decision based upon the facts in another case.

It is submitted that the decision of the District Court fails to recognize the real substance of the Commission's action and permits the Commission, by use of power not granted to it, to literally destroy Appellant's business and property. The questions presented by this appeal are substantial and they are of great importance not only to Appellant but the determination of them by the United States Supreme Court will be in the public interest.

[redacted]

On account of the substantial character and importance

of the questions presented by this appeal and for the foregoing reasons, jurisdiction should be noted and the judgment of the District Court reversed.

Respectfully submitted,

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Iowa City, Iowa

ATTORNEYS FOR APPELLANT

APPENDIX

Appendix "A"

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

— December 30, 1961 —

NO. 4-1146 CIVIL

MEMORANDUM OPINION

LAVERNE W. SIMPSON, d/b/a
MID-SEVEN TRANSPORTATION
COMPANY, DES MOINES, IOWA
Plaintiff,

vs.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Defendants.

and

MATSON, INC., AN IOWA CORPORATION
Intervenor.

D. C. NOLAN, Iowa City, Iowa, and WILLIAM N. DUNN, Eldora, Iowa, for the Plaintiff.

ROY W. MEADOWS, United States District Attorney, and FRANCIS A. SILVER, Associate General Counsel for Interstate Commerce Commission, for the Defendants United States of America and Interstate Commerce Commission.

WILLIAM N. DUNN, Eldora, Iowa, for the Intervenor.

Before VAN OOSTERHOUT, Circuit Judge, STEPHENSON and GRAVEN, District Judges.

GRAVEN, District Judge.

This is an action brought pursuant to Sections 1336, 2284, and 2321-2325 of Title 28 U.S.C.A., to restrain, annul, enjoin, and set aside a cease and desist order of the Interstate Commerce Commission (hereinafter the Commission) dated February 21, 1961, entered in Docket No. MC-C-1775. That order, reported in 84 M.C.C. 463, requires the plaintiff herein to cease and desist from any operations in interstate commerce of the character found in said report of the Commission to be unlawful. The precise operations which were found to be unlawful by the Commission involve the transportation by plaintiff of sixteen enumerated iron and steel commodities under certificates of public convenience and necessity authorizing the transportation of "structural steel" between designated points. The Commission has ruled in the order referred to that the plaintiff's certificates insofar as they authorize the transportation of structural steel do not authorize the transportation of the sixteen commodities listed and that transportation of such commodities in the past, purportedly pursuant to the authority granted in said certificates, has been at all times unlawful. A temporary restraining order was issued in this cause by Judge Roy L. Stephenson on May 12, 1961, and on May 22, 1961, the Commission issued an order postponing the compliance date of the cease and desist order until further order of the Commission.

On June 2, 1961, Matson, Inc., an Iowa corporation, was allowed by the Court to intervene in support of the plaintiff. The Intervenor is a motor carrier which, like plaintiff, holds a certificate of public convenience and necessity from the Commission authorizing the transportation of "structural steel" between designated points. Since the Intervenor allegedly transports many of the same steel commodities which the Commission has determined are not authorized by the commodity description

"structural steel," it has a substantial interest in the outcome of the present controversy.

The plaintiff, Laverne W. Simpson, doing business as Mid-States Transportation Company (now Mid-Seven Transportation Company), Des Moines, Iowa, holds certificates of public convenience and necessity Nos. MC 1683[1] and MC 1683[1] (Sub. No. 4). The former certificate, issued June 9, 1949, authorizes plaintiff to transport structural steel, brick, and heating equipment over irregular routes between Des Moines and points in Iowa, Minnesota, South Dakota, Nebraska, Illinois, Wisconsin, and Kansas. The latter certificate issued March 21, 1950, authorizes the transportation by plaintiff of the same commodities to and from certain points within a radius of twelve miles from Des Moines.

It has been stipulated that plaintiff has transported and continues to transport among other things the following items: (1) steel tees, zees and angles; (2) steel forgings; (3) steel sheets, strips and plates; (4) steel lathing and grounds; (5) wrought pipe; (6) iron bolts and nuts; (7) steel channels; (8) steel washers; (9) steel forms used and re-used for concrete construction; (10) steel tubing; (11) steel rings, rough; (12) steel beams; (13) reinforcing bars; (14) steel stampings; (15) steel bars, round and flat; (16) steel wire; (17) steel rivets; (18) steel welding rods; (19) steel screws; (20) steel bolts and nuts. From among the items listed above, only steel tees, zees and angles; steel channels; and steel beams were found to be structural steel under the final determination of the Commission.

The proceedings before the Commission in the present case have extended over a six-year period and are rather extensive. On February 23, 1955, Division Five of the Commission entered, on its own motion, an order instituting an investigation into the operations of plaintiff to determine whether he was transporting unauthorized

commodities in violation of Section 206 (a) of the Interstate Commerce Act, 49 U.S.C.A. Sec. 306 (a). Pursuant to this investigation, a hearing was held in Des Moines on October 4 and 5, 1956. At this hearing, both the Bureau of Inquiry and Compliance of the Commission and the plaintiff called expert witnesses who testified as to the meaning generally accorded the term "structural steel" within the trade and industry and also as to the specific application of that description to each of the twenty items or groups of items in question. As a result of this hearing, the hearing examiner issued a report and recommended an order in which he found that plaintiff had been and was engaged in transporting commodities in violation of the terms of his certificate. Of the twenty categories set forth above, the hearing examiner found that only three constituted structural steel. He specifically found that fourteen of the items in question did not constitute structural steel and that transportation of such items by plaintiff was not authorized. As to three of the items, apparently no finding or recommendation was made.

Plaintiff's exceptions to the hearing examiner's report and order were reviewed by Division One of the Commission which issued a report on October 3, 1957 (73 M.C.C. 75) in which it found that plaintiff's certificates authorized the transportation of all but six of the above enumerated iron and steel commodities transported by plaintiff. On January 20, 1958, the proceeding was reopened for reconsideration on the existing record. On July 6, 1959, Division One affirmed the findings in its prior report. 81 M.C.C. 98. On the petition of the plaintiff, the Commission on March 21, 1960, again reopened the proceedings for further consideration. This time the matter was heard before the entire Commission. The entire Commission, after reconsidering the case on the existing record, modified the prior reports of Division One and entered the order of February 21, 1961, heretofore

referred to, in which it found, as had the hearing examiner, that only three items among those currently being transported by the plaintiff were properly included in the commodity description "structural steel" appearing in plaintiff's certificates. It listed sixteen items* from among the twenty items in question which it found were not authorized by that commodity description and accordingly issued the cease and desist order which is herein challenged.

Before considering the errors urged in respect to the Commission's order, it seems desirable to consider the scope of judicial review to be accorded such orders. The interpretation of certificates issued by the Commission is primarily the responsibility of the Commission and the latter's action is not to be overturned unless capricious, arbitrary or clearly erroneous. *Andrew G. Nelson, Inc.* v. *United States* (1958), 355 U.S. 554, 558, 78 S. Ct. 496, 2 L. Ed. 2d 484; *Kroblin Refrigerated Xpress, Inc.* v. *United States* (D.C. 1961), 197 F. Supp. 39, 41-42; *Ace Lines, Inc.* v. *United States* (D.C. 1960), 197 F. Supp. 591, 595; *Malone Freight Lines* v. *United States* (D.C. 1952), 107 F. Supp. 946, 949, *aff'd* (1953), 344 U.S. 925, 73 S. Ct. 497, 97 L. Ed. 712.

In *Andrew G. Nelson, Inc.* v. *United States*, *supra*, the Supreme Court stated (page 558 of 355 U.S.):

> "In ascertaining that meaning [of words in a commodity description], we are not given *carte blanche;* just as '[t]he precise delineation of an enterprise which seeks the protection of the "grandfather" clause has been reserved for the Commission,' . . .

*The list of sixteen items actually contains seventeen of the twenty items in dispute, as the Commission grouped iron and steel bolts and nuts under one heading. Steel plates were not listed among the prohibited items, but a reading of the Commission's order would indicate that this may have been an inadvertent omission.

subsequent construction of the grandfather permit by the Commission is controlling on the courts unless clearly erroneous."

Similarly, in *Malone Freight Lines* v. *United States*, *supra*, the Court stated (page 949):

> "Our function does not involve a *de novo* construction of the certificate or a re-evaluation of the undisputed facts relating to the services being performed under the pretended warrant of its authority. We are not concerned with the weight of the evidence. The scope of our review is necessarily confined to the interpretation placed by the Commission upon a certificate of its own creation. We are bound by that interpretation unless we are persuaded that it was capricious or arbitrary, that it constituted an abuse of discretion or that it did violence to some established principle of law. It is beyond our province to consider 'the soundness of the reasoning by which its conclusions were reached.'"

It seems clear from the foregoing authorities that the courts are required to respect the findings and conclusions of the Commission in the interpretation of commodity descriptions such as are involved in the present case unless such findings "are shown to have been induced by prejudicial departure from legal standard or when such decision is arbitrary or the result of an abuse of discretion." *Ace Lines, Inc.* v. *United States* (D.C. 1960), 197 F. Supp. 591, 595.

The primary question which must be determined in this case is whether the meaning which the Commission has placed upon the commodity description "structural steel" as found in plaintiff's certificates is so lacking in rational basis as to be clearly erroneous. In viewing the record made before the Commission it is readily apparent that there is much conflict among so-called experts as to the proper meaning to be accorded this term. A structural engineer testified for the Bureau of Inquiry and

Compliance. Two consulting engineers, one of whom was also a college professor, testified for the plaintiff, as did a purchasing agent for a steel company. As to the testimony of these witnesses the hearing examiner concluded:

> "The foregoing recital of the testimony, with few exceptions, is conflicting as to whether the items set forth in the stipulation [the twenty items which have been listed above] are or are not structural steel as well as the definition of a structure and structural steel."

The Bureau's expert witness and one of the engineers testifying for the plaintiff agreed that structural steel was steel which was used in the necessary skeleton or framework of a structure. In applying this test to the twenty items in question, the Bureau's witness considered that seven of the twenty items were definitely not structural steel, that three of the items definitely were structural steel, and that the other ten items might or might not be structural steel depending upon the intended use of the item in question. The three expert witnesses who testified for the plaintiff each stated that all twenty items might properly be classified as structural steel, but in reaching this conclusion varied in their definitions of both structural steel and structure.

In considering the substance of all the testimony given as to what does or does not constitute structural steel, the hearing examiner stated as follows:

> "Throughout the testimony in this proceeding there has been injected therein the question as to whether the use to which the items involved are intended to be put determines whether they would be classified as structural steel."

In answer to this question, the hearing examiner, relying upon a previous ruling of the Commission in *Carroll Trucking Company, Interpretation of Certificate* (1953),

62 M.C.C. 348, refused to credit any of the testimony based upon the intended use of the various items and found that plaintiff was authorized to transport only those items which were clearly considered structural steel within trade and industry usage regardless of intended use. Of the twenty categories involved, only three were found to be included in the commodity description in question. These included steel tees, zees, and angles; steel channels; and steel beams.

Division One rejected to some extent the recommendations of the hearing examiner and accepted to a greater extent the testimony of the Bureau's witness that certain items could be properly classified as structural steel to the extent that these items are used in conenction with a structural system. While Diviison One agreed with the decision reached in the *Carroll* case that commodity descriptions referring to "structural steel" should not be interpreted *entirely* by applying an intended use test, it did not find that there was any sound objection to considering the views of the Bureau's own witness that the trade and industry characterization of what is and what is not "structural steel" is somewhat dependent upon the intended use of the particular steel commodity in question. On this basis Division One found that plaintiff was authorized under his certificates to transport fourteen of the twenty items in question, rejecting only steel lathing and grounds, wrought pipe, steel forms for concrete construction, steel sheets, steel stampings, and steel wire.

Upon reconsideration before the entire Commission, the findings of Division One were substantially modified as not adhering strictly enough to the interpretation of the term "structural steel" made in the *Carroll* case and thus actually being too liberal in determining the items comprising structural steel. The Commission felt that the following test announced in *Carroll* was controlling (62 M.C.C., at page 351):

> "[I]t is clear that under established trade and industrial usage, the term 'structural steel' refers to a group of rolled steels identified as such regardless of their intended use or application . . ."

In support of its conclusion, the Commission calls attention to the fact that Webster's New International Dictionary (2d ed. 1956) defines structural steel as "rolled steel in structural shapes," and a structural shape as "the shape of a member especially adopted to structural purposes." In addition, the Commission felt that its views were in accord with those expressed in a number of technical publications and information sources known throughout the steel industry, of which official notice was taken by the Commission (84 M.C.C., at pages 467-68). The conclusions of the entire Commission as to which items from among the twenty iron and steel items in question have an accepted trade and industrial identification as structural steel regardless of their intended use were in accord with those recommended in the first instance by the hearing examiner, although the latter had used a slightly different test in reaching his conclusions. Only steel tees, zees, and angles; steel channels; and steel beams were so included, all of which are structural shapes made by the rolling process.

Considering the Commission's arguments as a whole, it cannot be said that there is no rational basis whatsoever to support its interpretation. Plaintiff urges that the Commission's decision is not supported by the record made in this case and therefore is arbitrary and capricious. Plaintiff's conclusions concerning the weight of the evidence in the present case are no doubt correct. Even the Bureau's own expert witness, who was the most favorable from the view of the Commission, did not limit the commodity description in question as strictly as did the Commission in its final order. Nonetheless, it seems well settled that in reaching its decision the Commission is not confined to the record of a particular proceeding. As stated by the

Court in *J. H. Nozinsky Trucking Co.* v. *United States* (D.C. 1961), 195 F. Supp. 748, 751:

> "The Commission's reliance on the decision in Cleo Crouch Modification of Certificate, 53 M.C.C. 436 (1951), in arriving at its conclusions in the instant case does not constitute retroactive application of its rule-making power. . . . The Commission is not prohibited from referring to and incorporating an applicable prior ruling and its underlying considerations in later cases.";

and by the Court in *Sims Motor Transport Lines, Inc.* v *United States* (D.C. 1959), 183 F. Supp. 113, 119, *aff'd* (1960), 362 U.S. 637, 80 S. Ct. 1076, 4 L. Ed. 2d 1019:

> "It is only logical that the Commission, which is appointed by law and informed by experience to interpret the certificate issued by it, should be free to draw upon its own accumulative experience in reaching a decision."

To the same effect, see *Ace Lines, Inc.* v *United States* (D.C. 1960), 197 F. Supp. 591, 596.

The Commission's reliance upon its prior ruling in the *Carroll* case in arriving at the determination which it did in this case was not improper, as long as the prior ruling is not lacking in rational basis. The present case well demonstrates that in the interpretation of a commodity description divergent views are apt to arise even among so-called experts. For this reason it seems perfectly reasonable for the Commission, after due consideration, to adopt what it considers to be a reasonable construction of a particular commodity description and to apply that construction more or less uniformly thereafter in the interpretation of like descriptions. To require that each case be decided solely upon the weight of the evidence produced in that particular proceeding would greatly impair uniformity in the construction of such certificates. The interpretation which the Commission adopted in the

Carroll case, and adheres to here, was based upon a rather complete investigation, which produced much to support the Commission's order. See 62 M.C.C., at page 350.

Plaintiff objects to the following finding of the Commission in its final report (84 M.C.C., at page 468):

> "In the circumstances, and in the absence of any convincing evidence to the contrary, we must conclude that the term 'structural steel' as used in respondent's [plaintiff's] certificates has a trade and industry meaning which does not embrace the iron and steel items enumerated in our findings."

Plaintiff urges that the foregoing statement reveals the fact that the Commission failed to consider the views of his witnesses or even its own witness. It would seem that the foregoing statement only expresses the view of the Commission that the evidence presented in this case was not sufficient to cause the Commission to depart from the classification which it adopted in the *Carroll* case after a complete investigation. This was a choice which the Commission was free to make.

The plaintiff urges that the action of the Commission, in interpreting his certificates, amounts to a restriction, modification or partial revocation of those certificates in violation of Section 212 (a) of the Interstate Commerce Act, 49 U.S.C.A. Sec. 312 (a). It is true that the limitations placed upon the Commission's power to modify such certificates may not be by-passed under the guise of interpretation. *Andrew G. Nelson, Inc.* v. *United States* (1958), 355 U.S. 554, 558-59, 78 S. Ct. 496, 2 L. Ed. 2d 484. However, as stated by the Court in *Sims Motor Transport Lines* v. *United States* (D.C. 1959), 183 F. Supp. 113, 117, *aff'd* (1960), 362 U.S. 637, 80 S. Ct. 1076, 4 L. Ed. 2d 1019, in response to a similar argument:

> "The short answer to plaintiff's first contention is that the orders plaintiff asks us to set aside take no rights from it, but merely interpret what rights it had from the beginning. It is apparent from the rec-

> ord that defendant Commission has not sought to diminish or modify under guise of interpretative action, or otherwise, the operating authority of plaintiff, but has rather endeavored to provide a reasonable and fair construction of the same."

In *Andrew G. Nelson, Inc.* v. *United States, supra*, the Supreme Court stated the rule as follows (pages 558-59 (footnote 4) of 355 U.S.):

> "Commission interpretation of a permit, being simply a definitive declaration of what rights existed from the very beginning under the permit, cannot be equated with modification . . . unless found to be clearly erroneous."

Since it has been determined that the report and order of the Commission in the present case is not clearly erroneous, such interpretation is but declaratory of the operating authority possessed by plaintiff from the time of acquisition of his certificates and in no way diminishes that authority from what it once was.

Plaintiff offered the testimony of Mrs. Ethel L. Burton, who owned and operated the Dependable Transfer Company, plaintiff's predecessor in interest, during the "grandfather" days. Mrs. Burton testified that prior to coming under regulation the Dependable Transfer Company transported all of the twenty groups of iron and steel items which are in issue. Plaintiff's reliance in this proceeding upon the fact that the Commission's interpretation of his certificates does not accurately reflect the "grandfather" operations performed by his predecessors is misplaced. His remedy for this deficiency, if such a deficiency exists, lies not in attacking the Commission's interpretation of his existing certificates, but rather in having the "grandfather" proceedings reopened for modification of his operating rights. *Andrew G. Nelson, Inc.* v. *United States, supra.*

Plaintiff further contends that the Commission is now estopped from asserting any infraction of his operating

authority. As a basis for his estoppel claim, plaintiff relies upon the fact that he and his predecessors have had on file with the Commission, at all times since coming under regulation, published tariffs listing all of the articles actually being transported by them, including all of the items which the Commission now claims are not authorized by plaintiff's certificates. It has been stipulated that tariffs containing such information have in fact been on file with the Commission. In addition, the plaintiff testified that prior to acquiring his motor carrier business from Bernard L. Klein, his immediate predecessor, in 1949, he had purposely determined just what commodities his predecessor had been transporting under his certificate bearing the commodity description "structural steel." He further testified that on the basis of this investigation he purchased the business relying upon the fact that he would be authorized to transport all of the items which his predecessor had been hauling, which included all of the twenty items in question. Plaintiff urges that the Commission's failure to object, at some earlier date, to the transportation of the items now being challenged, when considered in conjunction with plaintiff's change of position in reliance, is enough to support the claimed estoppel.

The Commission urges that the doctrines of estoppel or laches may not be raised against the United States or its alter ego, the Interstate Commerce Commission. Without reaching the broader question of whether the Government might perhaps be estopped under certain circumstances, it seems clear that there can be no estoppel in this instance. In *Bird Trucking Co.* v. *United States* (D.C. 1955), 159 F. Supp. 717, 720, the Court rejected the plaintiff's argument that the Commission was estopped because it did not object when tariffs containing the disputed items were tendered for filing, stating:

> "The argument that plaintiff's are estopped to insist on their definition of 'groceries' because Mrs.

> Bird did not object to that term in her certificate of authority when issued, has as little merit as plaintiff's argument that the Commission is estopped to urge its definition because the Commission did not object when the Birds and Schaefer tendered tariffs for filing with the Commission, said tariffs listing some . . . [nonauthorized] commodities. There are many thousands of tariffs filed with the Commission. It would be an almost impossible task to check every tariff tendered for filing, against the provisions of the thousands of certificates of authority which have been issued to carriers. We hold that the fact that the Commission did not object to the inclusion of certain articles in a particular commodity list included in tariffs sent to the Commission for filing, does not prevent the Commission from passing on the correctness of such classification in a proper proceeding."

To the same effect, see *Morehouse* v. *United States* (D.C. 1961), 194 F. Supp. 940, 946, *aff'd* December 18, 1961, — U.S. —; *Sims Motor Transport Lines, Inc.* v. *United States* (D.C. 1959), 183 F. Supp. 113, 119, *aff'd* (1960), 362 U.S. 637, 80 S. Ct. 1076, 4 L. Ed. 2d 1019.

It seems clear that the Commission was under no duty or obligation to make an exact and final determination, when the tariffs in question were filed by the plaintiff, as to whether all of the numerous items listed in such tariffs were encompassed by the commodity descriptions in plaintiff's certificates. This being the case, the Commission is not estopped from later making an interpretation such as the present one which is necessary for purposes of enforcing Section 206 (a) of the Act, 49 U.S.C.A. Sec. 306 (a). To hold otherwise would be to place an undue burden of cross-reference upon the Commission and would create a situation whereby the transportation of unauthorized commodities over a period of years would eventually render such transportation legal.

As his final argument plaintiff contends that assuming that the action of the Commission in the present case is authorized by the Interstate Commerce Act, then that Act, as applied to his situation, is unconstitutional. He urges that he is deprived of both due process and equal protection of the law by the fact that the Act does not require the Commission to make, at any particular time, a final adjudication of the scope of a carrier's operating authority, thus allowing the Commission to raise this question for the first time after plaintiff, relying upon administrative non-action, had made a substantial capital contribution toward transporting the challenged items. In many respects this argument does not differ significantly from plaintiff's arguments as to estoppel and modification and must be rejected in part for the same reasons. Also, it would appear that under the Act the plaintiff could initiate upon his own motion a proceeding before the Commission to determine the construction to be placed upon his certificates if he were at any time uncertain as to such matters. See, *e.g.*, *Carroll Trucking Company, Interpretation of Certificate* (1953), 62 M.C.C. 348.

It is noticeable that during the six-year period antedating the institution of the present action the words "structural steel" assumed a somewhat accordionlike character, being expanded or contracted in scope either by the hearing examiner, Division One of the Interstate Commerce Commission, or the entire Commission, with the final contraction of the scope of those words being made by the latter. It is the order of the latter that is here being reviewed.

It is the view of this Court that it cannot be said that a factual and legal basis for the order of the Commission was lacking or that the order was arbitrary, capricious, or clearly erroneous.

It is the holding of this Court that the order of the

Commission here reviewed should not be set aside or vacated.

It is hereby ordered that judgment be entered vacating the temporary restraining order heretofore entered by this Court and dismissing plaintiff's complaint with prejudice.

The foregoing memorandum opinion shall constitute the Court's findings of fact, conclusions of law, and order for judgment as provided by Rule 52 (a) of the Federal Rules of Civil Procedure.

BY THE COURT:

/s/ MARTIN D. VAN OOSTERHOUT
Circuit Judge.

/s/ HENRY N. GRAVEN
Senior United States District Judge

/s/ ROY L. STEPHENSON
United States District Judge.

Appendix "B"

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

No. 4-1146 Civil

JUDGMENT

LAVERNE W. SIMPSON, d b a
MID-SEVEN TRANSPORTATION COMPANY, DES MOINES, IOWA

Plaintiff,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants

and

MATSON, INC., AN IOWA CORPORATION

Intervenor.

The above-entitled cause came on for hearing at the United States Courthouse at Des Moines, Iowa, on August 22, 1961, before the Honorable Martin D. Van Oosterhout, Judge, United States Court of Appeals, for the Eighth Circuit; the Honorable Henry N. Graven, Senior United States District Judge; and the Honorable Roy L. Stephenson, United States District Judge, who were designated as a three judge Court to hear the case under Section 2284(1), Title 28, United States Code. On August 22, 1961, the case was heard and submitted to the Court and by it taken under advisement.

On December 30, 1961, the Court entered herein its

Findings of Fact, Conclusions of Law and Order for Judgment. Now, therefore;

IT IS HEREBY ORDERED AND ADJUDGED that the complaint of the plaintiff be and the same is hereby dismissed with prejudice and that final judgment herein be and the same is hereby rendered in favor of the defendents.

IT IS FURTHER ORDERED AND ADJUDGED that the preliminary injunction heretofore issued herein be and the same is hereby vacated.

December 30, 1961.

BY THE COURT:

s/ MARTIN D. VAN OOSTERHOUT
Circuit Judge.

s/ HENRY N. GRAVEN
Senior United States District Judge.

s/ ROY L. STEPHENSON
United States District Judge.

Appendix "C"
INTERSTATE COMMERCE COMMISSION

No. MC-C-1775
LAVERNE W. SIMPSON—INVESTIGATION AND REVOCATION

Decided February 21, 1961

On reconsideration, findings in prior report, 81 M.C.C. 98, modified. Respondent found to be engaged in transportation not authorized in his certificate and in violation of the Interstate Commerce Act. Cease and desist order entered.

Appearances as shown in prior report.

SECOND REPORT OF THE COMMISSION ON RECONSIDERATION BY THE COMMISSION:

This proceeding has been the subject of two prior reports by division 1: An initial report, 73 M.C.C. 75, decided October 3, 1957, and a report on reconsideration, 81 M.C.C. 98, decided July 6, 1959.

This is an investigation instituted on motion of the Commission, former division 5, by an order of February 23, 1955, under sections 204(c) and 212(a) of the Interstate Commerce Act, with respect to the transportation activities of Laverne W. Simpson, of Des Moines, Iowa, doing business as the Mid-States Transportation Company,[1] hereinafter called respondent, to determine whether he is engaged in operation, in interstate or foreign commerce, as a common carrier by motor vehicle of certain

[1] By order of this Commission, division 1, dated January 3, 1956, subsequent to the institution of this proceeding, a petition of respondent was granted changing the trade name to Mid-Seven Transportation Company.

commodities the transportation of which is not authorized by his certificates of public convenience and necessity, in violation of section 206(a) of the act, with a view to the entry, if such violation is found, of appropriate orders to compel respondent to refrain from further violation under penalty of revocation of his certificates.

Respondent admits transporting steel tees, zees, and angles; steel forgings; steel sheets, strips, and plates; steel lathing and grounds; wrought pipe; iron and steel bolts and nuts; steel channels; steel washers; steel forms used and reused for concrete construction; steel tubings; steel rings; rough; steel beams; reinforcing bars; steel stampings; steel bars, round and flat; steel wire; steel rivets; steel welding rods; and steel screws under his certificates authorizing the transportation of structural steel. In the initial report herein, 73 M.C.C. 75, division 1 found that respondent's certificates, insofar as they authorize the transportation of structural steel, do not authorize the transportation of certain steel commodities,[2] hereinafter referred to as the six commodities; and that the transportation of these commodities in the past, purportedly pursuant to that authority, was unlawful. Upon reconsideration, in 81 M.C.C. 98, division 1 affirmed the findings in the prior report, noting at page 100:

> . . . steel lathing and grounds merely support plaster and form no part of the frame of a structure. Steel forms are devices or equipment which are used and reused in the course of construction and are not incorporated permanently into the skeleton or framework of a structure. Wrought pipe, steel sheets, steel stampings, and steel wire are not used normally as parts of the skeleton or framework of a structure, and therefore these commodities are not generally

[2] Steel lathing and grounds, wrought pipe, steel forms used and reused for concrete construction, steel sheets, steel stampings, and steel wire.

considered to be structural steel items in industry and trade. We conclude, therefore, that the six commodities do not fall within the term "structural steel" as that term is used in trade and industry.

Thereafter, upon consideration of the record and of a petition filed by respondent, to which our Bureau of Inquiry and Compliance, hereinafter called the Bureau, replied, the proceeding was reopened for reconsideration on the present record by order of March 21, 1960. A request for oral argument by respondent was denied by this order.

In support of his petition, respondent reiterates essentially the same contentions and arguments heretofore made in this proceeding, and again challenges the finding that the six commodities are not structural steel. He contends that the prior report erred (1) in failing to find that this Commission is estopped from challenging his right to transport the six commodities either because such challenge constitutes a collateral attack on his certificates, or because of the long period of time during which he has been transporting these commodities, and (2) in strictly construing the term "structural steel" and ultimately finding the six commodities not to be embraced thereunder. In reply, the Bureau contends that we are not estopped from interpreting and construing respondent's certificates in the administration and enforcement of section 206(a); and that the only commodities involved herein which may definitely be classified as structural steel are steel beams and steel tees, zees, angels and channels.

As indicated in the prior report, there can be no estoppel with respect to an interpretation of the terms of a certificate as a prerequisite to administration and the enforcement of section 206(a) of the act. Here we are determining which commodities lawfully may be transported under respondent's outstanding certificates and there is no attempt to revoke such authority under the guise of interpretation. With respect to respondent's second con-

tention, the record is conflicting as to whether or not the six commodities should be classified as structural steel. Respondent's witnesses would include these commodities under that description whereas the Bureau's witness would exclude them. If the term "structural steel" is given the broad meaning contended for by respondent, it could conceivably be interpreted to include the transportation of practically every kind of steel. This would be in direct conflict with the limiting adjective "structural," the use of which was clearly intended to restrict the character of the steel authorized to be transported. In fact, for reasons hereinafter stated, we now are of the opinion that the prior report did not adhere strictly to the intrepretation of the term made in *Carroll Trucking Co. Interpretation of Certificates*, 62 M.C.C. 348, hereinafter called the *Carroll* case, and was actually too liberal in determining the items comprising structural steel.

In the *Carroll* case, the Commission considered the question of whether the intended use of this steel item was exclusively determinative of whether it could be transported under authority to move structural steel, and decided that the term "structural steel" is generic in character and that the intended use test was not controlling, as had been found in earlier reports in the same proceeding. In lieu of the "intended use" test, reliance was placed upon trade and industry meaning of the term, which was considered broad enough to include steel channels intended for use in the manufacture of automotive lift trucks. The report therein states that "it is clear that under established trade and industrial usage, the term 'structural' refers to a group of *rolled steels* identified as such *regardless of their intended use or application* (our italics)." We observe that although the prior report on reconsideration herein considered whether the items involved were rolled steels and in that respect applied the test recognized in the *Carroll* case, the six commodi-

ties were specifically found not to fall within the term "structural steel" on the ground that they were not intended for use as part of the framework of a structure. In this connection, the prior report herein indicated "that the term has a trade and industrial usage which embraces certain additional items which are not rolled steels when these items are used in connection with structural systems." This determination was based upon expert opinion evidence adduced by witnesses for the Bureau and respondents, including structural engineers, which bore on the question whether the term "structural steel" has a trade and industry meaning embracing these items. The views of such witnesses, however, in respect to questionable items, were predicated largely upon the use made thereof. On further study of the matter, we are of the opinion that consideration of the use of these commodities is not in conformity with the interpretation made in the *Carroll* case. The evidence, therefore, will be reconsidered in this light.

There is no disagreement among the experts and trade representatives that steel beams and steel tees, zees, angles and channels are rolled steels and are considered by industry and the trade to be structural steel, and we so find. The rolling process is described by the Bureau's witness, a structural engineer, as the "taking of heated ingots and passing them through . number of rolls to shape the particular member into the particular shape desired, either an I-shape, T-shape or Z or angle shape, whatever shape is desired." This conforms to the statement in the *Carroll* case with respect to evidence presented by a construction engineer to the effect that structural steel may be defined "as steel rolled into shapes that are suitable for use in a structure." The evidence adduced in the instant proceeding shows that steel forgings, wrought pipe, iron and steel bolts and nuts, steel rings (rough), steel wire, steel rivets, and steel screws are not rolled steels and thus do not quality as "structural steel."

In the *Carroll* case, sheet steel is referred to as an item not commonly understood to be structural steel, and it follows that items made or produced therefrom do not fall in that category. Steel stampings and washings are stamped from sheet steel. Steel tubing is made from either steel sheets or thin plates, or directly from heated ingots. Steel forms used in concrete construction to form concrete into desired shapes are likewise fabricated from sheet steel or thin plate steel. Steel lathing and grounds are normally produced by cutting and stretching sheet steel. Moreover, since steel stampings, washers, tubing, forms, lathing, and grounds are not *shaped* by the rolling process, they are not rolled steels. As hereinbefore indicated, structural steel consists of a group of steels shaped by the rolling process. In the circumstances, we conclude that none of the items considered in this paragraph properly may be classified as structural steel.

Reinforcing bars, and steel bars, round and flat, are generally produced by the rolling process, but there is no showing as to whether or not steel welding rods are so produced. Respondent's witnesses claim that all of these items are structural steel. The structural engineer testifying in behalf of the Bureau asserts that steel strips are embraced within that term if used to fabricate or form acknowledged structural members; that reinforcing bars are not considered to be structural steel by the structural engineering industry; but that steel bars, round and flat, and steel welding rods are structural steel items if used in conjunction with other members of a structural steel system. We are unable to accord probative weight to the testimony of the Bureau's witness as it relates to steel bars, strips and rods because it in effect classifies those commodities on the basis of the uses to which they may be put. In rejecting the "intended use" test in favor of a generic interpretation in the *Carroll* case, the Commission said:

"Under the 'intended use test', any and all items

made of steel, including many not commonly understood to be embraced by the term, such as rods, bars, wire, pipe, fencing posts, sheet steel, and pressed steel, would be classified as structural steel so long as they are ultimately destined to be incorporated in a structure."

In view thereof and in the absence of any convincing evidence that the items referred to in this paragraph are identified by accepted trade and industrial usage as structural steel regardless of their intended use or application, we conclude that they are not embraced within the term "structural steel."

Although there appears to be a divergence of opinion in the testimony given by the respondent's witness and that adduced by the Bureau as to what items are commonly understood to comprise structural steel, we note that the Bureau's contentions are largely in agreement with the generic interpretation made in the *Carroll* case; and that such interpretation is wholly in accord with the dictionary meaning of the term and with the views expressed in a number of technical publications and information sources known throughout the steel industry, of which official notice may be taken and to which we shall now refer.

Although not conclusive, Webster's *New International Dictionary*, Second Edition, 1956, defines structural steel as "rolled steel in structural shapes," and a structural shape as "The shape of a member especially adapted to structural purposes, esp., in giving the greatest strength with the least material. Hence, any steel or iron member of such shape, as channel irons, I-beams, T-beams, etc., or sometimes a column, girder, etc., built up with such members." Similarly, in referring to such shapes, a 1951 publication of The American Iron and Steel Institute, entitled *The Making of Steel*, states, at page 58:

"Modern construction is largely made possible by

steel structural members. These peculiarly cross-sectioned members with which bridges, skyscrapers, ships and trains are built are known as "shapes."

The principal shapes are angles, beams, channels, tees, zees, and piling, all of which have particular spheres of usefulness. Their widely divergent sections have a common parentage, however, in the solid steel bar and the thick steel plate.

The function of structural shapes could be duplicated by bars or plates in large enough sizes. However, the careful design and engineering which goes into shapes permits great strength with a great saving in weight."

In the publication entitled *The Making, Shaping and Treating of Steel*, (United States Steel Corporation, Sixth Edition, 1951), it is stated, at page 794:

". . . In rolling mill parlance, the word 'shape' is used interchangeably with the word 'section' in describing forms of rolled steel (except geometrical shapes, which are known as rounds, squares, hexagons, etc.). Shapes or sections are normally divided into two classes, structural and other sections. Structural sections include standard items such as I-beams, channels, angles and wide flange beams and special sections such as zees, tees, bulb angle and car-building center sills. Other sections include such miscellaneous shapes as sheet piling, tie plates, cross ties, and those for special purposes."

Tables detailing the dimensions, elements, and profiles of various structural steel sections are to be found in Miner and Seastone's *Handbook of Engineering Materials*[1] at pages 2-191 through 2-203 under the title "Standard Structural Sizes—Steel." These same tables are indexed under the heading "Structural Steel, standard sizes," the

[1] Jointly published by John Wiley & Sons, Inc., New York, and Chapman & Hall, Limited, London, in 1955.

only reference made in the index therein to structural steel.

In the circumstances, and in the absence of any convincing evidence to the contrary, we must conclude that the term "structural steel" as used in respondent's certificates has a trade and industry meaning which does not embrace the iron and steel items enumerated in our findings. That we may and indeed must give consideration to trade and industrial usage in interpreting our certificates is clear. *Black* v. *Interstate Commerce Commission*, 167 Fed. (2d) 825; 335 U. S. 818.

On reconsideration, we find that respondent's certificates, insofar as they authorize the transportation of structural steel, do not authorize the transportation of (1) steel forgings, (2) steel sheets and strips, (3) steel lathing and grounds, (4) wrought pipe, (5) iron and steel bolts and nuts, (6) steel washers, (7) steel forms used and reused for concrete construction, (8) steel tubing, (9) steel rings, rough, (10) reinforcing bars, (11) steel stampings, (12) steel bars, round and flat, (13) steel wire, (14) steel rivets, (15) steel welding rods, and (16) steel screws; and that respondent's transportation of these commodities in the past, purportedly pursuant to that authority, has been unlawful. An appropriate order will be entered.

COMMISSIONER McPHERSON whom COMMISSIONER WALRATH joins, dissenting:

I would affirm the findings in the prior reports.

Appendix "C-1"

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington D. C., on the 21st day of February, A. D. 1961.

No. MC-C-1775

LAVERNE W. SIMPSON—INVESTIGATION AND REVOCATION

It appearing, That on October 3, 1957, the Commission, division 1, made and filed its report, 73 M.C.C. 75, and order in the above-entitled proceeding, requiring respondent to cease and desist from the performance of any operation, in interstate or foreign commerce, of the character found in the said report to be unlawful, and thereafter to abstain from a resumption of any such operation unless and until appropriate authority therefor is obtained;

It further appearing, That on July 6, 1959, the Commission, division 1, made and filed its report on reconsideration, 81 M.C.C. 98, and order in the above-entitled proceeding, affirming the findings in the initial report;

It further appearing, That by notice of August 24, 1959, said order of July 6, 1959, was stayed pending disposition of the matter, pursuant to section 17(8) of the Interstate Commerce Act;

It further appearing, That on March 21, 1960, upon consideration of the record, of a petition by respondent and a reply by the Bureau of Inquiry and Compliance, Interstate Commerce Commission, the proceeding was reopened for reconsideration on the present record;

And it further appearing, That upon reconsideration, a full investigation of the matters and things involved

has been made, and the Commission; on the date hereof, has made and filed a report on reconsideration herein containing its findings of fact and conclusions thereon, which report and the said reports of October 3, 1957, and July 6, 1959, are hereby referred to and made a part hereof:

It is ordered, That respondent herein be, and is hereby, notified and required to cease and desist from the performance of any operations in interstate or foreign commerce of the character found in this report to be unlawful and thereafter to refrain from a resumption of any such operations unless appropriate authority therefor is obtained;

It is further ordered, That the statutory effective and compliance date after which failure to comply with the terms of this order may lead to revocation of respondent's certificates be, and is hereby, fixed as April 10, 1961.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

CERTIFICATE OF SERVICE

I hereby certify that I have today served the foregoing jurisdictional statement of the Appellant upon each of the parties and upon the Solicitor General of the United States pursuant to the requirements of Rule 33, by depositing copies thereof in envelopes in the United States Post Office with first class postage prepaid (air mail postage for parties outside the State of Iowa) addressed to the Solicitor General and to each of the following counsel of record for such parties:

Solicitor General of the United States,
Department of Justice, Washington 25, D.C.;

Donald A. Wine, Esq., United States District Attorney, Southern District of Iowa,
Room 202 Federal Court Bldg., Des Moines, Iowa;

Robert W. Ginnane, Esq., General Counsel,
Interstate Commerce Commission, Washington 25, D.C.

Francis A. Silver, Esq., Associate General Counsel,
Interstate Commerce Commission, Washington 25, D. C.

Dated this 22nd day of February, 1962.

D. C. NOLAN
405 Iowa State Bank Bldg.
Iowa City, Iowa

ATTORNEY FOR APPELLANT

Office-Supreme Court, U.S.
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No. 748

In the Supreme Court of the United States

OCTOBER TERM, 1961

LAVERNE W. SIMPSON, APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

MOTION TO AFFIRM

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INDEX

	Page
Statement	1
Argument	4
Conclusion	8

CITATIONS

Cases:

Andrew G. Nelson, Inc. v. *United States*, 355 U.S. 554	5, 6
Black v. *Interstate Commerce Commission*, 167 F. 2d 825, certiorari denied, 335 U.S. 818	5
Carroll Trucking Company Interpretation of Certificate, 62 M.C.C. 348	3, 4, 5
Federal Crop Insurance Corp. v. *Merrill*, 332 U.S. 380	7
Moog Industries, Inc. v. *Federal Trade Commission*, 355 U.S. 411	8
Service Storage & Transfer Co. v. *Virginia*, 359 U.S. 171	4
Sims Motor Transport Lines, Inc. v. *United States*, 183 F. Supp. 113, affirmed, 362 U.S. 637	5, 6
Todd v. *Securities and Exchange Commission*, 137 F. 2d 475	8
United States v. *Summerlin*, 310 U.S. 414	7
United States v. *Tucker Truck Lines*, 344 U.S. 33	8

Statute:

Interstate Commerce Act, Section 206(a), 49 U.S.C. 306(a)	2, 7

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In the Supreme Court of the United States

OCTOBER TERM, 1961

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LAVERNE W. SIMPSON, APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court convened pursuant to 28 U.S.C. 2282 and 2325. The judgment dismissed a complaint to set aside and enjoin the enforcement of an order of the Interstate Commerce Commission directing the appellant to cease and desist from con-

ducting certain motor carrier operations found to be unauthorized by his common carrier certificates.

Appellant holds certificates of public convenience and necessity authorizing him to transport structural steel, brick, and heating equipment between various points in Iowa, and between points in Iowa and six other states (J. St. 3a). In 1955, the Commission instituted an investigation under Section 206(a) of the Interstate Commerce Act, 49 U.S.C. 306(a), to determine whether appellant was transporting certain commodities not authorized by his certificates. After full administrative proceedings (described in the district court opinion, J. St. 3a–5a), the Commission held that the authority in appellant's certificates to transport "structural steel" does not cover sixteen enumerated iron and steel items which appellant was transporting.[1]

The Commission interpreted the certificates to authorize carriage of a specific group of rolled steels identified as "structural steel" according to the accepted trade and industrial usage of the term. It rejected appellant's contention that, in determining whether particular items were "structural steel,"

[1] The items, transportation of which was held to be unauthorized, are (J. St. 27a): (1) steel forgings, (2) steel sheets and strips, (3) steel lathing and grounds, (4) wrought pipe, (5) iron and steel bolts and nuts, (6) steel washers, (7) steel forms used and reused for concrete construction, (8) steel tubing, (9) steel rings, rough, (10) reinforcing bars, (11) steel stampings, (12) steel bars, round and flat, (13) steel wire, (14) steel rivets, (15) steel welding rods, and (16) steel screws. The Commission held that the certificate authorized appellant to carry steel tees, zees and angles, steel channels and steel beams (J. St. 23a).

their intended use or application was controlling, *i.e.*, that steel items were "structural" if they were to be incorporated in the framework of a structure. The Commission reaffirmed its ruling in *Carroll Trucking Company, Interpretation of Certificate*, 62 M.C.C. 348, that "under established trade and industrial usage, the term 'structural' refers to a group of rolled steels identified as such regardless of their intended use or application." It pointed out (J. St. 22a):

> * * * If the term "structural steel" is given the broad meaning contended for by respondent, it could conceivably be interpreted to include the transportation of practically every kind of steel. This would be in direct conflict with the limiting adjective "structural," the use of which was clearly intended to restrict the character of the steel authorized to be transported. * * *

The Commission noted (J. St. 25a–26a) that its interpretation accorded with the dictionary definition of "structural steel" and with technical publications and information sources known throughout the industry, of which it took official notice. The Commission rejected expert testimony that certain of the products carried by appellant were structural steel, on the ground that this testimony was based upon the intended use of the products (J. St. 24a). The Commission concluded (J. St. 27a) that "the term 'structural steel' as used in respondent's certificates has a trade and industry meaning which does not embrace the iron and steel items enumerated in our findings."

The district court unanimously upheld the Commission's interpretation of appellant's certificates as covering only these products which are considered to be structural steel under accepted trade and industry usage. It ruled (J. St. 10a) that the Commission was justified in relying upon its prior decision in the *Carroll* case in construing appellant's certificates, since "it seems perfectly reasonable for the Commission, after due consideration, to adopt what it considers to be a reasonable construction of a particular commodity description and to apply that construction more or less uniformly thereafter in the interpretation of like descriptions." The court also rejected appellant's contentions that the Commission, under the guise of interpretation, was modifying or partially revoking his certificates (J. St. 11a–12a); and that the Commission was estopped from challenging his right to transport the commodities involved because he and his predecessors in interest had been transporting them for a long period pursuant to tariffs on file with the Commission (J. St. 12a–15a).

ARGUMENT

This appeal presents no substantial question warranting plenary review by this Court. It involves only the meaning of a narrow technical term in appellant's certificates of public convenience and necessity, and the district correctly upheld the Commission's interpretation of its own certificates.

1. The interpretation of a certificate issued by the Commission is primarily a question for that agency (see *Service Storage & Transfer Co.* v. *Virginia*, 359 U.S. 171), and its interpretation "is controlling on

the courts unless clearly erroneous." *Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. 554, 558. *Sims Motor Transport Lines, Inc.* v. *United States*, 183 F. Supp. 113 (N.D. Ill.), affirmed, 362 U.S. 637. In the present case, the district court correctly upheld the Commission's interpretation of its certificates on the ground that it had a "factual and legal" basis and was not "arbitrary, capricious, or clearly erroneous" (J. St. 15a).

As the court below stated, the Commission's decision in the present case follows its prior decision in the *Carroll* case, in which the term "structural steel" was held to mean a certain group of rolled steels identified as such by "established trade and industrial usage". The Commission's view of the governing trade usage is supported by technical and trade publications, and by the dictionary definition. The district court noted that the interpretation which the Commission adopted in the *Carroll* case was based upon an extensive investigation (see 62 M.C.C. at 350), and the court held that since this interpretation had a "rational basis," the Commission properly relied upon it here.

The Commission is, of course, required to give consideration to trade and industry meaning of terms (*Black* v. *Interstate Commerce Commission*, 167 F. 2d 825 (C.A. 5), certiorari denied, 335 U.S. 818). The Commission was fully justified in relying upon its interpretation of the trade meaning of the term "structural steel" in the earlier *Carroll* case, since such reliance is one way in which the agency draws upon "its own accumulative experience in reaching

a decision" upon the scope of certificates. *Sims Motor Transport Lines, Inc.* v. *United States*, 183 F. Supp. 113, 119 (N.D. Ill.), affirmed, 362 U.S. 637. As the court below noted, "[t]o require that each case be decided solely upon the weight of the evidence produced in that particular proceeding would greatly impair uniformity in the construction of such certificates" (J. St. 10a).

2. There is no substance to appellant's claim that the action of the Commission amounts to a modification and partial revocation of his certificates. The interpretation of appellant's certificates is "simply a definitive declaration of what rights existed from the very beginning under the permit" and "cannot be equated with modification * * * unless found to be clearly erroneous" (*Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. at 558–559 fn. 4). Here, as noted, the Commission's interpretation was fully justified.

If, as appellant claims, its certificates do not accurately reflect the scope of the "grandfather" operations (by appellant's predecessors in interest) upon which it is based, appellant's "recourse is to petition the Commission to reopen the grandfather proceedings * * *. Such a contention is no answer to the present charge of permit violation, since the permit cannot be collaterally attacked" (*Nelson, supra*, 355 U.S. at 561–562). Appellant, of course, may at any time apply to the Commission to reopen the grandfather proceedings.

3. Nor is there any basis for appellant's attempt to invoke the doctrine of laches or estoppel against the

Commission, on the ground that, under published and filed tariffs, appellant and his predecessors in interest had been transporting the commodities involved for many years. In the first place, laches or estoppel may not be invoked against the government. *United States* v. *Summerlin*, 310 U.S. 414; *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380. Moreover, as the Commission's division 1 pointed out in this case (73 M.C.C. 75, 78), there is no duty upon the Commission to review tariffs at the time of filing, in order to determine whether all of the numerous items embraced in such tariffs are included in the commodity descriptions in the carriers' certificates, and it would be "impracticable" and "virtually impossible" to do so. The district court agreed, stating that the Commission "is not estopped from later making an interpretation such as the present one" which is necessary for the purposes of enforcing Section 206(a) of the Act, 49 U.S.C. section 306(a). "To hold otherwise," the court noted, "would be to place an undue burden of cross-reference upon the Commission and would create a situation whereby the transportation of unauthorized commodities over a period of years would eventually render such transportation legal" (J.S. 14a).

Appellant's argument (J. St. 15–16) that the Interstate Commerce Act is unconstitutional if it authorizes the Commission to prohibit appellant's unauthorized operations which he has been conducting for a long time is, as the district court stated (J. St. 15a), but another formulation of his laches and estoppel contentions. Since appellant did not raise his constitu-

tional claim before the agency, it is not open to him on judicial review. Cf. *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 36–37; *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 414; *Todd* v. *Securities and Exchange Commission*, 137 F. 2d 475, 478 (C.A. 6). In any event, as the district court held (J. St. 15a), the argument in this form is subject to the same infirmities as when phrased in terms of laches and estoppel, and "must be rejected in part for the same reasons." Appellant was not denied any constitutional rights when he was directed to terminate his unauthorized operations.[2]

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

ARCHIBALD COX,
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MARCH 1962.

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[2] As the district court noted (J. St. 15a), appellant could always have sought an interpretation of his certificates by the Commission, if he had doubt as to their meaning.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 748.

OCTOBER TERM, 1961.

LAVERNE W. SIMPSON ET AL.,
Appellant,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA.

BRIEF IN REPLY TO MOTION TO AFFIRM.

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INDEX

Statement	1
Argument	2
Substantial Questions	2
Answers to Appellees' Contentions	2
Conclusion	6
Certificate of Service	7

CITATIONS

CASES:

Andrew G. Nelson, Inc., v. *United States*, 355 U.S. 554	4
Carroll Trucking Company, Interpretation of Certificate, 62 M.C.C. 348	2-3
Baltimore & Ohio R. Co. v. *United States*, 289 U.S. 347	6
East Texas Lines v. *Frozen Food Express*, 350 U.S. 48	3
Interstate Commerce Commission v. *Allen Kroblin, Inc.*, 348 U.S. 836	3
United States v. *Rock Island Motor Transit Co.*, 340 U.S. 417	5
United States v. *Seatrain Lines*, 329 U.S. 424	5

STATUTE:

Interstate Commerce Act, Section 212 (b), 49 U.S.C.A. 312 (b)	5

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BRIEF IN REPLY TO MOTION TO AFFIRM.

The Appellant, under Rule 16, Paragraph 3, files this Reply to Appellees' Motion to Affirm.

STATEMENT.

The facts and issues involved in this appeal are fully set out in Appellant's Jurisdictional Statement (J. St. 5-9); and the questions on which the decision depends are substantial (J. St. 9-17).

ARGUMENT.

This case involves the following *substantial questions*:

A. Can the Interstate Commerce Commission arbitrarily disregard the record evidence and decide a case solely upon an arbitrary basis;

B. Is a governmental agency immune from the application of the doctrine of estoppel, when not to apply it will result in the ruination of a man's business;

C. Does the issuance of a final certificate to a motor carrier by the Interstate Commerce Commission constitute a final determination of the carrier's rights or may such rights be re-examined and redetermined at the Will of the Commission;

D. May the Interstate Commerce Commission at any remote time redetermine a carrier's rights, and is the Interstate Commerce Act, which purports to grant such authority, unconstitutional as an improper delegation of legislative authority and a violation of the due process clause of the U. S. Constitution; and

E. Does the action of the Interstate Commerce Commission, when acting as both the prosecutor and judge constitute a denial of due process when its decision is based upon its decision in another case which case is in no way related in fact to the record evidence in the case involved?

ANSWERS TO APPELLEES' CONTENTIONS.

1. Appellees state, in substance, in their Motion to Dismiss, that the Commission's decision was not arbitrary because it followed its prior decision in *Carroll Trucking*

Company, Interpretation of Certificate, 62 M.C.C. 348, that "under established trade and industrial usage, the term 'structural' refers to a group of rolled steels identified as such regardless of their intended use or application", and that the Commission properly concluded in this case that "the term 'structural steel' as used in respondent's (Appellant's) certificates has a trade and industry meaning which does not embrace the iron and steel items enumerated in (its) findings". (J. St. 27A).

However, in reaching its conclusion the Commission made three (3) different decisions and determinations as to which items involved constituted "structural steel". (See 73 M.C.C. 75; 81 M.C.C. 78 and 84 M.C.C. 463). It is thus manifest that the Commission was not only uncertain as to what in fact constitutes "structural steel" but did, in its final decision, arbitrarily conclude, without regard for the record, that a limited number of items, being transported by Appellant, fell in that category. A complete absence of reference to the Record should be noted in the Commission's decision (See J. St. 19A-27A). The Commission is limited, in its determination of cases before it, by the record of the cases and the right of judicial review of its orders and decisions. See: *East Texas Lines* v. *Frozen Food Express*, 350 U.S. 48, 100 L. Ed. 917; *Interstate Commerce Commission* v. *Allen Krobl n, Inc.*, 348 U.S. 836, 99 L. Ed. 659. Standards or criteria promulgated by it, when contrary to the Record or when they pass the limits of reasonableness, are within the judicial power of review conferred by Congress. This is such a case.

The record evidence conclusively established that the steel items involved were "structural steel". The Record clearly demonstrates this fact and only from a review of the Record can the arbitrary character of the Commission's decision be determined. The *Carroll* case, *supra*, merely

established the principle that "structural steel" included steel channels intended for use in the manufacture of automotive lift trucks.

2. The contention that Appellant's recourse was to petition the Commission to re-open the *grandfather* proceedings for an interpretation of his certificates (citing *Andrew G. Nelson, Inc., v. United States*, 355 U.S. at 558-559) is without merit. The Commission's action (an investigation into the operations of Plaintiff [Appellant] to determine whether he was transporting unauthorized commodities * * * J. St. 3a-4a) did in fact constitute an interpretation of Appellant's operating authority because of the extended proceedings before the Commission, including the nature and extent of operations (*grandfather*) conducted by Appellant's predecessors (See footnote one (1) J. St. 5). Appellant presented to the Commiss on everything he could show or claim under his predecessor's *grandfather's* rights.

Any further action before the Commission would have been futile and fatal. It would have meant the cessation of operations by Appellant during such proceedings under the Commission's cease and desist directory. This case is distinguishable from the *Nelson* case, *supra*, in that, in that case, it does not appear that the evidence of *grandfather* operations were "brought to the Commission's attention".

3. Appellees' assertion that the doctrine of estoppel may not be invoked against the Government, or any agency thereof, is the general rule but not without its exceptions. *See cases cited in Appellant's Jurisdictional Statement, pages 11-12-13.*

In this case Appellant and his predecessors had on file with the Commission, for over 20 years, their tariffs setting forth in detail all of the commodities involved,

which was notice to the Commission, and to the world, the items and commodities being transported. Further, the Commission made or was required to make a full review of the scope of the certificates involved when they were transferred to Appellant. *Commission approval of such transfer being required under the Interstate Commerce Act, Part II*, 49 U.S.C.A. 312 (B). Appellant relied upon such approval and invested substantial sums in property and equipment in reliance thereon. (See footnotes two (2) page 5, J. St., and one (1) page 6, J. St.)

As against the claim that it would be "impractical" for the Commission to review such published and filed tariffs, to determine the extent and scope of a carrier's operations, even upon the required review on transfer of the certificates, we have, in this instance, the ruinous and irreparable consequences to Appellant if the Commission is not held to be estopped from revoking, by interpretation, his operating authority.

If the issuance of the certificate to Appellant, after formal review, as required by Part II of the Interstate Commerce Act, 49 U.S.C.A. 312 (B), did not establish Appellant's rights, then would there ever be an end? It is submitted that under *U. S. v. Seatrain Lines*, 329 U.S. 424, 91 L. Ed. 396; *U. S. v. Rock Island Motor Transit Co.*, 340 U.S. 417, 95 L. Ed. 391, the issuance of the certificates to Appellant to transport "structural steel" embraced all of the items which his predecessors had been hauling for many years and was *res judicata*.

4. Appellees' assertion that Appellant cannot raise the unconstitutionality of the Interstate Commerce Act, if it authorized the Commission to revoke, at will and at any remote time, Appellant's operating authority, for the first time in the lower Court, when such claim was not

made before the Commission, is the general rule but, again, there are exceptions and this case is one where the exception peculiarly applies. See *Baltimore & Ohio R. Co. v. United States*, 289 U.S. 347, 80 L. Ed. 1209.

What would it have availed Appellant to claim before the Commission that under the Interstate Commerce Act it did not have authority to limit Appellant's operating rights after many years of operation? The Commission was the Judge of its own acts, and would it have determined that it did not have authority to do what it did —we don't believe it would. This issue merits full argument before and consideration by this Court to avoid the harsh injustice which will befall Appellant if relief is not granted to him in this case.

CONCLUSION.

For these and the reasons set forth, in Appellant's Jurisdictional Statement, substantial questions are presented in this appeal and jurisdiction should be noted and the judgment of the District Court reversed.

Respectfully submitted,

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WILLIAM N. DUNN,
Eldora, Iowa,
WILLIAM L. MEARDON,
Iowa City, Iowa,
Attorneys for Appellant.

CERTIFICATE OF SERVICE.

I hereby certify that I have today served the foregoing Brief of the Appellant upon each of the parties and upon the Solicitor General of the United States pursuant to the requirements of Rule 33, by depositing copies thereof in envelopes in the United States Post Office with first class postage prepaid (air mail postage for parties outside the State of Iowa) addressed to the Solicitor General and to each of the following counsel of record for such parties:

Solicitor General of the United States, Department of Justice, Washington 25, D. C.;

Donald A. Wine, Esq., United States District Attorney, Southern District of Iowa, Room 202 Federal Court Bldg., Des Moines, Iowa;

Robert W. Ginnane, Esq., General Counsel, Interstate Commerce Commission, Washington 25, D. C.;

Francis A. Silver, Esq., Associate General Counsel, Interstate Commerce Commission, Washington 25, D. C.

Dated this day of April, 1962.

D. C. NOLAN,
405 Iowa State Bank Building,
Iowa City, Iowa,
Attorney for Appellant.

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JOHN T. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 748.

OCTOBER TERM, 1961.

LAVERNE W. SIMPSON ET AL.,
Appellant,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA.

PETITION FOR REHEARING.

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA.

PETITION FOR REHEARING.

The Appellant, under Rule 58, files this Petition for Rehearing on the Decision and Order of this Court, sustaining Appellees' Motion to Affirm the Judgment of the Court below, entered herein on April 30, 1962.

STATEMENT.

This case involved very substantial questions (Jur. S., pp. 9-17), among which are the questions of the *Denial of the Equal Protection of Law and Due Process.* See jurisdictional questions IV and V (Jur. S., pp. 15-17).

BASIS OF CLAIM OF DENIAL OF EQUAL PROTECTION OF LAW.

The proceedings (investigation by the Interstate Commerce Commission) in this case were instituted some eight (8) years after Appellant had acquired and had been operating under authority granted him by the Commission and almost twenty (20) years after the operating rights involved had been granted to Appellant's predecessor by the Commission.

The Statute (49 U.S.C. 204 (c) and 312 (a)) does not provide for any limitation or period in which the rights and obligations of the Applicant, and other carriers, operating thereunder must be settled if the right of the Commission to institute such proceedings at any remote time is upheld.

The Statute *"lays down no rules by which its impartial execution can be secured or partiality and oppression prevented"*. See: *Yick Wo v. Hopkins*, 118 U.S. 373. Whether the Commission defines what rights a carrier actually has granted him within a reasonable time or twenty (20) years later now depends, under the present policy of the Commission, upon the mere personal reaction or whim of the Commission.

BASIS OF CLAIM OF DENIAL OF DUE PROCESS.

The decision of the Commission in this case (see appendix C. of Jur. S.), is predicated solely upon an arbitrary conclusion of the Commission and in utter disregard of the record. In deciding the case the Commission disregarded Appellant's rights and took from him valuable rights without regard to the devastating effect it would have upon Appellant's business.

The Commission determined and found:

> "* * * We must conclude that the term 'structural steel' as used in respondent's (Appellant's) certificates has a trade and industry meaning which does not embrace the iron and steel items enumerated in our findings.";

and in support of such determination cited *Carroll Trucking Company Interpretation of Certificates*, 62 M.C.C. 348, and entirely disregarded the record in the instant case.

CONCLUSION.

Thus, it is submitted that the questions presented by this Appeal are so substantial and ones which have not been heretofore passed upon by this Court that *Rehearing* should be granted and upon *Rehearing* the Motion to Affirm denied and jurisdiction of this case noted for full presentation and argument to this Court.

Respectfully submitted,

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WILLIAM N. DUNN,
Eldora, Iowa,
WILLIAM L. MEARDON,
Iowa City, Iowa,
Attorneys for Appellant.

CERTIFICATE OF MERIT.

I, D. C. Nolan, one of Counsel for Appellant, do certify and state that the within *Petition for Rehearing* is filed and presented in good faith, and not for the purpose of delay because Appellant sincerely believes that a great

wrong and injustice has been done to him by the action of the Interstate Commerce Commission in this case.

D. C. NOLAN,
Iowa City, Iowa,
Attorney for Appellant.

CERTIFICATE OF SERVICE.

I hereby certify that I have today served the foregoing Petition for Rehearing of the Appellant upon each of the parties and upon the Solicitor General of the United States pursuant to the requirements of Rule 33, by depositing copies thereof in envelopes in the United States Post Office with first class postage prepaid (air mail postage for parties outside the State of Iowa) addressed to the Solicitor General and to each of the following counsel of record for such parties:

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Francis A. Silver, Esq., Associate General Counsel, Interstate Commerce Commission, Washington 25, D.C.

Dated this _____ day of May, 1962.

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